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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 669

THE BIG SLOUGH DRAINAGE DISTRICT OF SEDGWICK COUNTY, KANSAS, ET AL.,
Appellants,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF SEDGWICK COUNTY, KANSAS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION TO DISMISS OR AFFIRM

FRED W. ALEY,
City Attorney;
LAWRENCE E. CURFMAN,
Assistant City Attorney;
HOWARD T. FLEESON,
WAYNE COULSON,
L. A. HASTY,
W. F. LILLESTON,
CHARLES S. RHYNE,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 669

THE BIG SLOUGH DRAINAGE DISTRICT OF SEDGWICK COUNTY, KANSAS; THE RIVERSIDE DRAINAGE DISTRICT OF SEDGWICK COUNTY, KANSAS; THE PROTECTION DRAINAGE DISTRICT OF SEDGWICK COUNTY, KANSAS; VALLEY CENTER TOWNSHIP OF SEDGWICK COUNTY, KANSAS; PARK TOWNSHIP OF SEDGWICK COUNTY, KANSAS; WACO TOWNSHIP OF SEDGWICK COUNTY, KANSAS; DELANO TOWNSHIP OF SEDGWICK COUNTY, KANSAS; RIVERSIDE TOWNSHIP OF SEDGWICK COUNTY, KANSAS; SALEM TOWNSHIP OF SEDGWICK COUNTY, KANSAS; WM. D. McDOWELL, J. R. STEARNS, G. WILBUR, B. B. MEYER, H. W. RALSTIN, H. S. LOYD, AND E. CARL JONES,

Appellants,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF SEDGWICK COUNTY, KANSAS, AND THE CITY OF WICHITA, KANSAS,

Appellees

MOTION OF APPELLEES, THE BOARD OF COUNTY COMMISSIONERS OF SEDGWICK COUNTY, KANSAS, AND THE CITY OF WICHITA, KANSAS, TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM.

Come now the appellees, The Board of County Commissioners of Sedgwick County, Kansas and The City of Wichita, Kansas, and each of them, and respectfully move

the court to dismiss the appeal in this case for each and all of the following reasons:

1. The order appealed from (Transcript pp. 70, 71) is not a final judgment or decree and is not appealable (28 U. S. C. A. Sec. 344). It is a mere order overruling the intervenors' motion for judgment on the pleadings. In Kansas the final judgment in a proceeding in mandamus is a peremptory writ of mandamus (Sections 60-1708, 1710, General Statutes of Kansas, 1935), and no peremptory writ has issued or other final judgment or order been made or entered in these proceedings.

SUPPORTING STATEMENT

These proceedings below were consolidated mandamus proceedings originally brought in the Supreme Court of Kansas by The City of Wichita and The Board of County Commissioners of Sedgwick County against George W. Robb, Auditor of State of the State of Kansas (not a party to this appeal) to require the defendant Auditor to register temporary notes, and the appellants here (intervenors below) without hearing and ex parte procured leave to file answers, and did so. Under the Kansas statutes, upon application for a writ of mandamus the practice obtained and followed in these proceedings was and is for the court to allow an alternative writ (to show cause) and that alternative writ and the answers thereto are the only pleadings allowed in the case (Sec. 66-1709, General Statutes of Kansas, 1935).

The answers of intervenors (appellants here) tendered various issues of *fact* (still untried) in support of the federal constitutional questions presented by them. However, pursuant to the practice permitted in and by the Supreme Court of the State of Kansas and followed in this case, each of the plaintiffs below filed its separate preliminary motion

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entitled "Plaintiffs' Motion for Determination of Issues of *Law* in Advance of Trial," expressly reserving in said motion the right to "proceed to trial should there remain issues of fact for trial."

The opinion of the Supreme Court of the State of Kansas was confined to the questions of law thus preliminarily presented in said motions and each of them. No evidence was ever taken, introduced or received by the Supreme Court of Kansas in said litigation. After the opinion was handed down on certain questions of law as aforesaid, the appellants here (intervenors below) filed their Motion for Judgment (Transcript 66), and it is from a mere docket entry—"motion by Intervenors for judgment denied" (Transcript pp. 70, 71)—overruling that motion for judgment, that appellants have appealed.

The facts set out in the Answer of Intervenors were *not* (as stated in paragraph 1 of Appellants' Assignment of Errors) admitted to be true, and the record nowhere shows said or any such admission. By statute, in mandamus proceedings in Kansas, "if answer be made, containing new matter, *the same shall not, in any respect, conclude the plaintiff*, who may, *on the trial* or other proceeding, *avail himself of any valid objections to its sufficiency*, or may countervail it by proof, either in direct denial or by way of avoidance" (Sec. 60-1708, General Statutes of Kansas, 1935). Notwithstanding this provision of the statute, the plaintiffs out of an abundance of caution expressly reserved the right to further plead and to go to trial, as indicated in the last paragraph of Plaintiffs' Motion for Determination of Issues of Law in Advance of Trial (Transcript 30, 33).

The Supreme Court of Kansas has original jurisdiction only of proceedings in mandamus, quo warranto and habeas corpus (Constitution of Kansas, Art. 3, Sec. 3); that is to say, its *only* jurisdiction here is in mandamus. It is elementary that intervention is in subordination to the prin-

cipal case. Now there has been no determination of such questions as (1) the jurisdiction of the Supreme Court of Kansas of such remaining collateral matters upon intervention in a mandamus proceeding *now moot* (the Auditor having registered the notes), or (2) the misjoinder of the diverse intervening interests here alleging various issues in connection with contemplated condemnations and damage claims with respect to their scattered and separate properties, the obvious position of the plaintiffs being that other courts are the proper tribunals of first instance and other remedies adequate to accord due process of law to the intervenors if and when condemnation should ensue.

There has been and is no final judgment or decree to appeal from.

2. On December 29, 1948, the defendant George W. Robb, as Auditor of State of the State of Kansas, afforded to appellee, City of Wichita, the only relief sought by it in the action by registering said appellee's Improvement Temporary Note of The City of Wichita, Kansas, Series 13, Number 1, dated July 1, 1948, copy of which was attached to the alternative writ of mandamus. Said note was sold by said appellee to the Fourth National Bank in Wichita, Kansas, on December 31, 1948. The controversy at one time existing between the parties ceased to exist and the cause became moot long prior to the allowance of the appeal (*Codlin* v. *Kohlhausen*, 181 U. S. 151; *Brownlow* v. *Schwartz*, 261 U. S. 216); that on December 28, 1948, the defendant George W. Robb, as Auditor of State of the State of Kansas, afforded to appellee, The Board of County Commissioners of Sedgwick County, Kansas, the only relief sought by it in these proceedings by registering said appellee's temporary note, the registration of which was sought by said Board in these mandamus proceedings, and said note was sold and delivered by the appellee Board to the Fourth National Bank

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in Wichita, Kansas on January 25, 1949; that appellants are only intervenors entering the litigation in subordination to the principal case, which became moot before this appeal was taken or sought.

In the alternative, appellees and each of them move the court to affirm the orders appealed from because the questions on which the decision of the cause depends are so unsubstantial as not to need further argument, in support of which appellees call attention to the opinion of the court below reported in 166 Kan. 122, 199 P. 2d 530, the opinion in the companion case of *Cow Creek Valley Flood Prevention Assn.* v. *Glick*, 166 Kan. 78, 200 P. 2d 299, decided the same day, and to the decisions of this Court cited in the two opinions.

FRED W. ALEY,
City Attorney;
LAWRENCE E. CURFMAN,
Assistant City Attorney;
HOWARD T. FLEESON,
WAYNE COULSON,
L. A. HASTY,
W. F. LILLESTON,
CHARLES S. RHYNE,
Counsel for Appellees.

STATE OF KANSAS,
Sedgwick County, ss:

Wayne Coulson, of lawful age, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for appellee, The City of Wichita, and has been at all times hereinafter mentioned, and has personal knowledge of the facts hereinafter appearing; That on December 29, 1948, the defendant George

W. Robb, as Auditor of State of the State of Kansas, afforded to appellee, City of Wichita, the only relief sought by it in the action by registering said appellee's Improvement Temporary Note of The City of Wichita, Kansas, Series 13, Number 1, dated July 1, 1948, copy of which was attached to the alternative writ of mandamus. Said note was sold by said appellee to the Fourth National Bank in Wichita, Kansas, on December 31, 1948.

WAYNE COULSON.

Subscribed and sworn to before me by Wayne Coulson of Wichita, Sedgwick County, Kansas, this March 11, 1949.

ETHYL McMURRY,
[SEAL.] *Notary Public in and for*
Sedgwick County, Kansas.

My commission expires February 22, 1951.

STATE OF KANSAS,
Sedgwick County, ss:

L. A. Hasty, of lawful age, being first duly sworn, deposes and says:

That he is attorney and County Counselor for The Board of County Commissioners of Sedgwick County, Kansas and has been at all times hereinafter mentioned, and that he has personal knowledge of the facts hereinafter alleged; that on December 28, 1948, the defendant George W. Robb, as Auditor of State of the State of Kansas, afforded to appellee, The Board of County Commissioners of Sedgwick County, Kansas, the only relief sought by it in these proceedings by registering said appellee's temporary note, the registration of which was sought by said Board in these mandamus proceedings, and said note was sold and

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delivered by the appellee Board to the Fourth National Bank in Wichita, Kansas on January 25, 1949.

L. A. HASTY.

Subscribed and sworn to before me by L. A. Hasty at Wichita, Sedgwick County, Kansas, this March 11, 1949.

ETHYL McMURRY,
Notary Public in and for
Sedgwick County, Kansas.

[SEAL.]

My commission expires February 22, 1951.